

Office of Chief Counsel
Internal Revenue Service
memorandum

date: March 10, 1998

to: National Director, Specialty Taxes CP:EX:ST
Attn: Thomas R. Hull

from: Assistant Chief Counsel (Income Tax & Accounting)

subject: Statute of Limitations for Assessable Penalties

This responds to your September 25, 1997, request for assistance in the development of a sample retention policy for use in the dyed diesel fuel program. Specifically, you requested an opinion regarding what statute of limitations period for the filing of a claim for refund is applicable to the penalty assessed under § 6715(a) of the Internal Revenue Code and what begins the running of that limitations period. We are also providing information regarding what statute of limitations period for collection is applicable to the penalty assessed under § 6715(a) and what begins the running of that limitations period.

In addition, you ask us to address three possible scenarios regarding the assessment of the penalty provided in § 6715(a) of the Code: 1) The penalty is assessed on Form 3552¹ and payment is received at that time or shortly thereafter; 2) The penalty is assessed on Form 3552 and payment is received after collection actions (i.e. levies, liens) are taken (which can be one or two years after assessment); and 3) The penalty is assessed on Form 3552 and payment is not received in spite of collection actions.

As background, § 4081 of the Code provides for the imposition of a tax on diesel fuel. Section 4082 exempts diesel fuel from that tax if the fuel meets certain requirements, including that it be indelibly dyed and destined for a nontaxable use. Section 6715 imposes a penalty upon any person who sells, or holds for sale, dyed fuel for any use that such person knows or has reason to know is not a nontaxable use. The penalty also applies to any dyed fuel held for use or used by any person for a use other than a nontaxable use and such person knew, or had reason to know, that such fuel was so dyed. Finally, the penalty applies to a person who willfully alters, or attempts to alter, the strength or composition of any dye or marking done pursuant to § 4082 in any dyed fuel. Section 6715 provides that the penalty is in

¹Form 3552 is the form used by the Service to record the assessment of the § 6715 penalty. Portions of the form are also used as the notice and demand for the penalty amount assessed.

addition to the tax (if any). We understand that a return may or may not be filed for the excise tax on this fuel.

Section 6671 of the Code provides that the penalties and liabilities provided by this subchapter (which includes § 6715) shall be paid upon notice and demand by the Secretary, and shall be assessed and collected in the same manner as taxes. Section 6671 also provides that, except as otherwise provided, any reference in this title to "tax" imposed by this title shall be deemed also to refer to the penalties and liabilities provided by this subchapter. Thus, the general period of limitations for collection and claims for refund apply to the penalties provided by § 6715.

The general period of limitations for collection is found in § 6502 of the Code which provides that assessed taxes may be collected within 10 years after the assessment of the tax. This period may be extended by mutual agreement between the Internal Revenue Service and the taxpayer. Therefore, the Service generally has 10 years from the assessment to collect the § 6715 penalty. Thus, we conclude that, in all three scenarios listed above, the 10 year statute of limitations on collection begins to run once the assessment of the § 6715 penalty (on Form 3552) has been made unless the period is extended by mutual agreement between the Service and the taxpayer.

The general refund limitations provision is found in § 6511 of the Code which provides that a claim for refund of an overpayment of any tax imposed by this title in respect of which tax the taxpayer is required to file a return shall be filed by the taxpayer within 3 years from the time the return was filed or 2 years from the time the tax was paid, whichever of such periods expires the later, or if no return was filed by the taxpayer, within 2 years from the time the tax was paid. Section 301.6511(a)-1(a) of the regulations provides that in the case of any tax (other than a tax payable by stamp) if a return is filed, a claim for credit or refund of an overpayment must be filed by the taxpayer within 3 years from the time the return was filed or within 2 years from the time the tax was paid, whichever is later, or if no return is filed, the claim for credit or refund of an overpayment must be filed by the taxpayer within 2 years from the time the tax was paid.

Therefore, if no return is filed for the tax on the fuel, a claim for refund of the § 6715 penalty must be filed within 2 years from the time the penalty was paid. In those situations where an excise tax return is filed, a claim for refund may be made within 3 years from the time the return was filed. Thus, we conclude that a taxpayer has at least two years from the time the § 6715 penalty amount is actually paid to claim a refund in scenarios 1 and 2. Also, if a return is filed for the tax on the fuel, the taxpayer would have three years to claim a refund from

when the return was filed if that is after the two year period. See Rev. Rul. 60-58, 1960-1 C.B. 638. Because the penalty amount is never paid, the taxpayer in scenario 3 is not entitled to a refund.

We hope this information is helpful in developing the sample retention policy. Should you have any further questions regarding this matter, please contact Christie Jacobs at 622-4930.

Sincerely,

Assistant Chief Counsel
(Income Tax & Accounting)

By _____
Michael D. Finley
Chief, Branch 3